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Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANT,
vs.
THE UNION COAL COMPANY. } No. 76.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANT,
vs.
THE UNION COAL COMPANY. } No. 76.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR THE UNITED STATES.

CASE MADE IN THE BILL.

The bill filed in this case asks for the cancellation of some fourteen patents covering, in the aggregate, upwards of 2,235 acres of land situated in Weld County, Colorado.

The ground on which this relief is prayed is that the patents were obtained from the United States by means of a fraudulent conspiracy, for that purpose, between one R. R. McCormick and certain other persons, averred to be unknown, who had combined together under the name of "The Denver Land Association."

The bill alleges that all the preëmption entries, on which the several patents rest, were made by some one or more of the parties to the conspiracy in the names of fictitious persons, or by fraudulent personations of the individuals whose names were used, and that the pretended witnesses used to prove up the several preëmption claims were fictitious or were fraudulent personations, and that, in either case, the fraud was by the procurement of some one or more of the said conspiracy, who, in like manner, paid the purchase money for the said land in the names of the pretended parties who appeared to have made the said false and fraudulent entries.

The bill avers that no such persons as those in whose names the said entries were made and to whom said patents were issued ever settled upon or improved the tracts of land described in the said patents or were ever citizens of Weld County at all, or ever seen or heard of there, and that the several affidavits purporting to show the settlement and improvement of the said tracts were false and fraudulent, for the purpose of deceiving the United States and obtaining the said patents.

It appears by the bill that all the lands in question were pretended to be conveyed by the several fictitious entrymen to David H. Moffatt, jr., as trustee of the Denver Land Association, and that of these fourteen pretended conveyances ten were made on the same day as the entries, and the others in less than a week after, except one, which was 8 days after.

The bill shows (pp. 44, 45) that by several mesne conveyances all the said lands purported to have been con-

veyed to Sidney Dillon, trustee, who, on October 17, 1883, attempted to convey the same to the appellee, The Union Coal Company.

The bill charges that all the grantees in the pretended conveyances aforementioned had full knowledge of the fraud and illegality involved in the said entries and patents, and, waiving an answer under oath, prays that the said patents may be declared void and delivered up and canceled together with all the pretended deeds of conveyance aforesaid, and for general relief.

THE ANSWER.

The answer avers that respondent purchased the tracts of land in question in good faith, paying a large sum therefor, and without any knowledge or ground to believe or suspect that there was fraud or illegality of any kind in making the said entries, or in issuing the said patents founded on them, and respondent denies that any of the parties through whom it claims title in the premises had notice of any fraud or irregularity; that for some years before respondent purchased the said lands they had been extensively worked as a coal mine, and that the United States has been guilty of gross laches in delaying these proceedings until after so much money has been expended on the faith of the patents which it is now sought to set aside, and should not be granted the relief prayed for. (pp. 54–57).

REPLICATION.

To this answer the United States filed a replication. (p. 58).

THE TESTIMONY.

The complainant examined several witnesses and the defendant one witness. As these depositions will be referred to below in the argument, it is unnecessary to take any notice of them at this point.

HEARING AND DECREE.

The cause came on for hearing at the May Term, 1888, and the court adjudged and decreed that the bill should be dismissed (p. 147).

APPEAL ALLOWED.

And at the same term, and on motion of the United States, an appeal from the said decree was allowed (p. 147).

ASSIGNMENT OF ERROR.

It is respectfully submitted that the said decree was erroneous, in this, that the relief prayed for in the bill should have been granted.

ARGUMENT.

This case comes directly within the principle laid down in *Moffat* vs. *United States* (112 U. S., 24), namely, that where the entry of land and the patent pursuant to it, is in the name of a fictitious person, the title to the land covered by the entry and patent does not pass from the United States, and the plea of bona fide purchaser of such land is not maintainable.

In the case cited, Mr. Justice Field, speaking for the court, said:

> The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent bona fide purchaser is protected. A subsequent purchaser is bound to know whether there was, in fact, a patentee, a person once in being, and not a mere myth, and he will always be presumed to take his conveyance upon the knowledge of the truth in this respect. To the application of this doctrine of a bona fide purchaser there must be a genuine instrument having a legal existence, as well as one appearing on its face to pass the title. It can not arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be. Even in the case of negotiable instruments, where the doctrine is carried farthest for the protection of subsequent parties acquiring title to the paper, it can not be invoked if the instrument be not genuine, or if it be executed without authority from its supposed maker. *Floyd's Acceptances* 7 Wall., 666, 676; *Marsh* v. *Fulton County* 10 Wall., 667, 684. pp. 31, 32.

Indeed, the similarity between the case at bar and that case is greater than would appear at first blush. It is a pregnant fact that in *both cases* this same David H. Moffat, jr., appears as the grantee of the fictitious entrymen (pp. 42, 43, 44), and in neither case does he come forward as a witness to prove the reality of his grantors, an omission which evoked the animadversion of this court in commenting on *Moffat* v. *United States* in the case of the *Colorado Coal Company* v. *United States* (123 U. S., 307). Mr. Justice Matthews, speaking for the court, says, in pointing out the distinction between the latter and the former cases:

> In that case Moffat did not offer his deed in evidence, was not examined as a witness, and attempted no proof either of his own innocence or of the payment of value, but stood without explanation as to who his immediate grantors were, or how he came in contact with them.

It is to be further remarked, that Robert E. Carr, who figured in the case of Moffat *v.* United States (*supra*), also figures, to some extent, in the case at bar (p. 69, 74).

Before even looking into the evidence, then, we find ourselves in an atmosphere of suspicion, and quite prepared for the fraud and conspiracy established by the depositions.

When we look into the depositions we find that the fraud and conspiracy in obtaining the said patents charged in the bill took place beyond a reasonable doubt.

No attempt is made to shake the credit of the witnesses Briggs (pp. 70–73), Mitchell (pp. 83–86), Plumb (p. 89), Keyes (pp. 91, 92), John C. Bailey (pp. 93–95), Joseph R. Bailey (pp. 95, 96), and Clark (p. 97), who live very near, and some of them on land adjoining the land in question, who were constantly passing over some parts of that land, who were acquainted with all the people living in that region of country, and who testify that they never knew or heard of any one of the pretended preëmptors and patentees, and that no such persons ever lived or made improvements on any of the land in question.

This testimony falsifies the various affidavits, or pretended affidavits, made in the local land office, duly certified copies of which are in the record (pp. 101–138).

The evidence produced by the United States is sufficient to establish the case made in the bill beyond a reasonable doubt, and would seem to be quite as strong as the evidence which convinced the court in *Moffat* v. *United States* (*supra*), judging from the following language of Mr. Justice Field, in that case:

> There was no presumption here in favor of the officers which the testimony produced by the complainant did not entirely rebut and overthrow. Numerous witnesses, living in the immediate neighborhood of the land, testified that they were well acquainted with it, had been frequently upon it, that no one resided there, and that no improvements were made as stated in the preëmption papers. They also testified that they never knew nor heard of persons by the names of the alleged preëmptors, nor of the persons whose names were used in the attempted proof of settlement and cultivation. Neither the register nor the receiver came forward to disprove the conclusions which this testimony justified, that the pretended preëmptors and patentees were fictitious persons. The suggestion that real parties may have appeared before the register and the receiver as preemptors and witnesses, having the names used, though usually known by different names, is far-fetched, and merits no consideration where the fact, with reasonable explanation for the use of the unusual names, was not established, nor proof adduced of the settlement on, and improvement of, the land. No such attempt was made, and if it had been it would, according to the evidence received, have signally failed (p. 30).

To meet this convincing evidence of the complainant, the defendant has not vouchsafed a particle of testimony, for the deposition of Mr. Sidney Dillon in support of the defense of bona fide purchaser is of no value whatever to the defendant if the patents were nullities because made to fictitious persons.

Indeed, the omission to examine David H. Moffat, jr., *the immediate grantee* of the pretended patentees, and under whom defendant claims, amounts to a confession of the allegations of fraud and conspiracy. It does not seem to be explainable on any other ground.

But for the fact that McDowell, an agent seemingly employed by Mr. Dillon as representative of the Union Coal Company to buy the land in question, was at the same time representing the vendors (see Mitchell's dep., p. 87), it would appear more remarkable that Mr. Dillon and the company were not informed of the audacious fraud that was known to everybody in Weld County. Nobody can doubt that McDowell knew all about the fraud (p. 75),

and his knowledge was that of his principal, the Union Coal Company, the appellee.

But we are advised that it will be contended in support of the decree that the case of *Colorado Coal Company* v. *United States* (123 U. S. R., 307) is conclusive of this case.

We, however, do not think that the reasoning of the court in the case relied on is applicable to the state of facts presented by the record in this appeal.

In the case relied on, the bill filed by the United States for the cancellation of certain patents for land proceeded on the ground that the register and receiver of the land office of the district where the land lay had entered into a conspiracy with other persons to get the land in question by fraud, and that the records and papers representing the pretended proceedings in the land office on which the patents were founded were the fraudulent fabrications of the said register and receiver and their fellow conspirators, and that the persons named in said proceedings as entrymen and witnesses were fictitious, and that the grantees named in the several patents never had existence.

The only evidence offered by the Government to support the grave charges against the register and receiver was to the effect that no persons bearing the names of those mentioned in the proceedings and patents lived in the county where the land lay, and made improvements thereon, as had been testified in the pretended proceedings in the land office.

The court said that the evidence was not sufficient to establish the guilt of the register and receiver because it was consistent with the theory that real persons had ap-

peared in the land office and made the entries and affidavits under assumed names.

Clearly, such evidence was not sufficient to overcome the presumption that the land officers were innocent. It amounted to no more than a suspicion that they had fabricated the entry papers.

But when the court came to the question of the invalidity of the patents on the ground that the grantees named therein were fictitious, it did not deny the force of the evidence for that purpose, but said that the case of the Government had failed because it had neglected sources of apparently *more direct* evidence in omitting to examine the several persons who had acted as attorneys in procuring the patents and "*who must have known for whom in fact they were acting.*"

The court further held that the Government had been guilty of an omission in not calling the register and receiver. After having cast suspicion on its own officers, in whose acts it had invited public confidence, the court held that the Government could not force innocent purchasers to bear the odium of such witnesses in making their defense, but should have called them itself in the interest of justice. We beg leave to quote the very words of the court:

> Neither do we think the reason assigned, as an excuse on the part of the Government for not calling the register and receiver as witnesses, is valid or satisfactory. One of them, it was said at the bar, had died. But the other might and ought to have been examined. He was one of its own officers, through whom the Government had received the price of the lands sold, and which it has ever since retained. If his official conduct was impugned, nevertheless his misconduct, if proved, was not imputable to the defendants, *and they should not be prejudiced by the odium of an accusation against him.* The United States had trusted him, and, inspired by that confidence, the defendants also had

> relied upon his official acts. In this faith they had paid full value for what they had reason to believe was a perfect title. They were not accused of any complicity with, nor had they any knowledge of, the fraud charged. In the absence of direct proof of his guilt the Government could not properly treat the defendants as his confederates, *nor deprive them of any defense which as a witness he might be able to make for himself*. The United States had no higher interest at stake than to establish the truth and justice of the transaction. It was due from it to these parties, whose estate this suit was instituted to defeat, to produce and examine as witnesses those who must have had the best knowledge of the facts, so as not to force the defendants to explanations which, by the very theory of their innocence and ignorance, they were incapable of making. *To raise a suspicion, however strong, of the fraud and wrongdoing of its own officers is not enough to justify the Government in casting upon the defendants the burden of establishing their title* (pp. 320, 321). (Italics our own.)

But it will be observed that the conditions of the case at bar are very different from those in the case cited. Here no attack is made upon the register and receiver by the Government, and the omission of the Government to examine them is hardly open to remark, even because nothing is more improbable than that they knew anything more about the personality of the actors in these frauds than was stated in their affidavits. Those interested in the success of the frauds were too shrewd to take anyone before the land officers to make an entry under an assumed name who was not a stranger to them. At the same time, the other side could have examined these officers if they had seen fit, there being no reason why they should have been afraid to do so, so far as any imputation by the Government was concerned.

The duty of the Government to call the register and receiver in the case of the Colorado Coal Company arose solely from the fact that the Government had virtually prevented the defendants from doing so by trying to make those officers infamous. It was reasonable, then, under

the circumstances, to hold that the Government's case was not made out, because the sources of information mentioned had not been resorted to.

From our knowledge of human nature, it is the most improbable of all things that the register or receiver knew the real personality of the individuals who appeared before them to make the pretended entries, and it would seem to have been useless to call them to testify that anything relating to such personality had been proved before them, as such evidence would have been mere hearsay, apparently. The same remark seems applicable to the omission to call the notaries before whom the deeds to Moffat were acknowledged.

It is true that a like omission is unfavorably noticed in the opinion in the case of the Colorado Coal Company, but we apprehend that the court did not mean to intimate that that omission alone would have been fatal to the case of the Government if the other and more important omissions had not occurred.

Indeed, the more that case is studied the plainer does it seem to be that the controlling reason for the action of the court was the unreasonableness of asking the cancellation of patents upon indirect evidence alone, when the Government had neglected to call as witnesses such well-know persons as Britton and Gray, who, as attorneys, obtained the patents, but had nothing to do with the alleged fraudulent proceedings in the land office at Denver.

The unfavorable presumption which always arises when a party fails to produce important accessible evidence, without accounting for the omission, necessarily deter-

mined the action of the court in that case. The Government was in the position of a party who should to prove the facts of an assault and battery solely by the evidence of persons who viewed the occurrence from distant points, without examining any one of the bystanders. It is easy to see that the jury in such a case would refuse to believe such evidence without a satisfactory explanation of the omission to call the witnesses who were at the scene of action.

The question in the case of the Colorado Coal Company was mainly as to the probative power of the testimony; in other words, it was a pure question of fact, and we can not argue that the evidence in the case at bar is not sufficient, because, under *somewhat* similar conditions, the evidence in the case cited failed to convince the court.

The court laid down no such arbitrary rule in that case.

The question, then, in this appeal is whether there is any such failure to produce evidence as amounts to an apparent suppression of the truth, whether intentional or unintentional. That is the sole question.

It seems, therefore, that there is ground in the record for the reversal of the decree.

WM. A. MAURY,
Assistant Attorney-General.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

No. 76.

THE UNITED STATES,

Appellant,

vs.

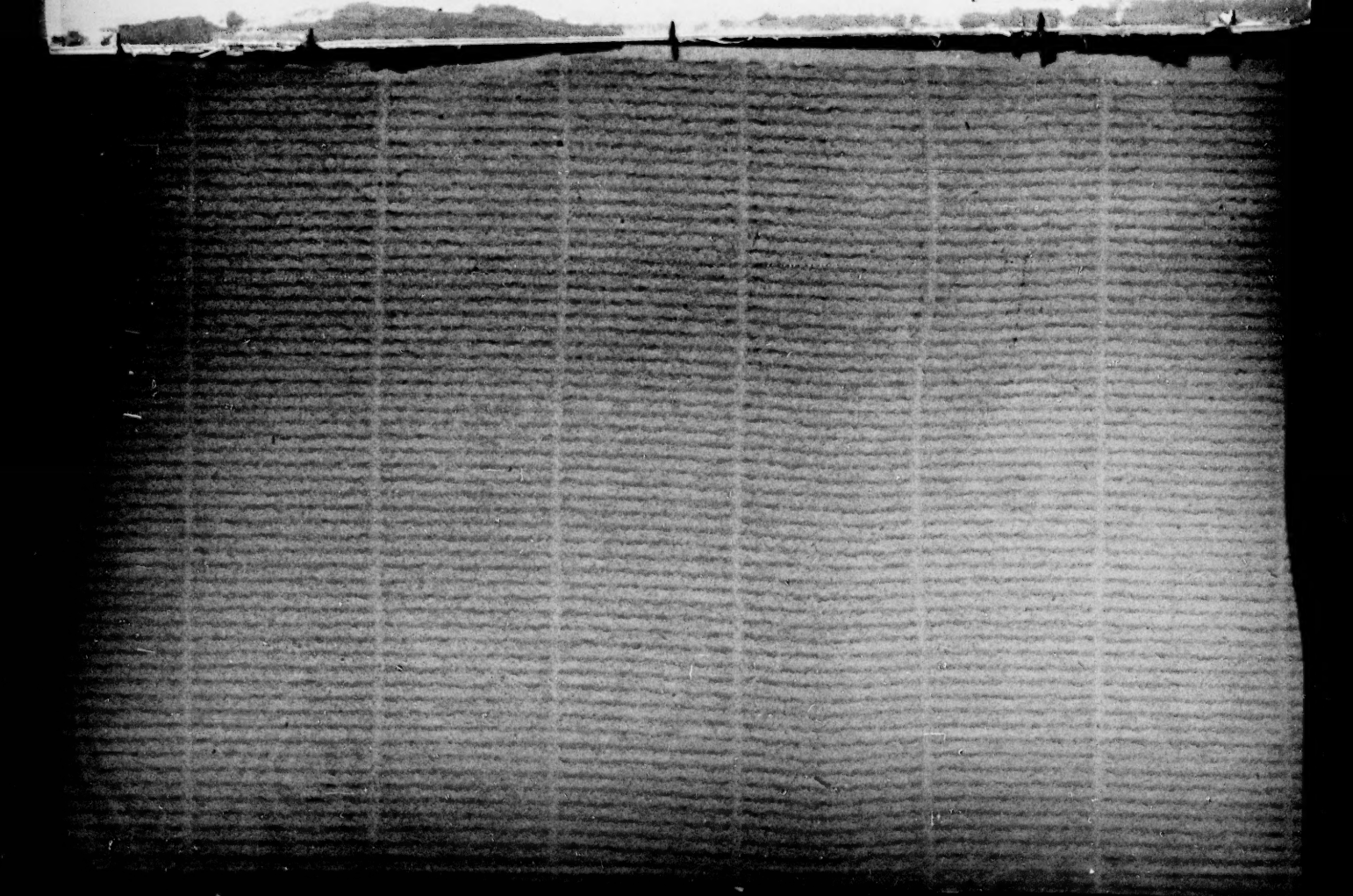
THE UNION COAL COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

BRIEF FOR APPELLEE.

JOHN F. DILLON,
HARRY HUBBARD,
For the Appellee.

C. G. BURGOYNE, Cor. Centre and Walker Sts., New York.



Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 76.

THE UNITED STATES,
Appellant,
vs.
THE UNION COAL COMPANY.

Brief for
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

Statement of the Case.

THIS CASE comes to this Court on appeal from the final decree of the Circuit Court of the United States for the District of Colorado, dismissing the bill of complaint herein (Record, p. 147). This was a suit in equity brought by the United States against the Union Coal Company asking the Court to annual and cancel certain United States Patents to about 2240 acres of land situated in the County of Weld, State of Colorado, and subsequent deeds of said lands. These lands are particularly described in the Record, page 1. The

patents bore dates in the years 1870 and 1871, and were issued to various persons, each patent conveying 160 acres or thereabouts (Record, p. 138, *et seq.*). The only party defendant was the Union Coal Company (Record, p. 1).

COMPLAINT. The bill of complaint, which was filed August 26, 1886, alleged (Record, p. 1) that May 1, 1870, and long prior thereto the United States was the owner of the lands in question. It also alleged (Record, p. 1) that one R. R. McCormick, and certain other persons whose names are unknown to complainant, devised a fraudulent scheme, and in pursuance thereof fraudulently and illegally procured from the United States patents to the said lands. It then alleged and stated in substance (Record, pp. 2, 3) certain rules and regulations of the Interior Department of the United States Government in relation to the sale and disposition of lands and the granting of patents therefor. The complaint also alleged (Record, p. 3) that the said R. R. McCormick and others had become possessed of certain scrip known as Agricultural College Scrip, which had been issued to the State of Tennessee under the Act of Congress, approved July 2, 1862, which they used in paying for certain of said lands. The complaint (Record, pp. 4 to 42) then takes up one by one each distinct parcel of 160 acres or thereabouts of the land in question described in the Record, page 1, and (devoting about three pages to each parcel) alleges in detail the making in due form of the necessary affidavits, proofs, applications, payments for the land, issuing of certificates and receipts therefor; also the transmission of all the said affidavits, proofs, applications, certificates

and receipts to the General Land Office of the United States at Washington, and the issuing of patents thereupon to the persons named as entitled thereto. The complaint also alleges in respect to each of said parcels of land that the officers of the United States were deceived and misled by the things aforesaid, and that the statements and allegations in said applications, affidavits and proofs were totally false, fraudulent and untrue; that no such persons as were pretended had ever lived upon the said lands or cultivated the same or made improvements thereon, and that the persons who it was pretended had done so were not real persons, but were myths and fictitious persons. The complaint further alleges that subsequently each of the said persons to whom said patents were issued respectively sold and conveyed said respective parcels of land to David H. Moffat, Jr., trustee of the Denver Land Association (Record, pp. 42 to 44). The complaint further alleges (Record, p. 44) that afterwards said David H. Moffat, Jr., sold and conveyed one undivided half of all the said described lands to the Colorado Coal Company, and that (Record, p. 44) said Colorado Coal Company afterwards sold and conveyed the same to Sidney Dillon, trustee; also, that the said David H. Moffat, Jr., sold and conveyed the other undivided one-half of the said lands to the St. Louis and Denver Mining Company, which company afterwards sold and conveyed the same to Sidney Dillon, trustee; and that (Record, p. 45) said Sidney Dillon, trustee, sold and conveyed all the said lands to the defendant, the Union Coal Company. The complaint also alleged that each and every of the grantees in each and all of the said conveyances received said deeds with full knowledge of

the alleged fraud above mentioned. The complainant then demanded as relief that each of the several patents and deeds of conveyance be set aside, declared void, delivered up and canceled. The complaint concluded with the usual prayer for general relief.

Note that the appellee, the Union Coal Company, is the only defendant to the bill. Neither the patentees, nor their grantees, nor any of the grantors or grantees in said mesne conveyances are parties.

Note, also, that no charge whatever is made in the pleadings against either the Receiver or Register of the Land Office at Denver before whom the various applications, proofs and affidavits were made and sworn to (Record, pp. 99–138).

THE ANSWER. The answer of the Union Coal Company, which was filed July 14, 1887 (Record, p. 54 *et seq.*), admitted that, on June 1, 1870, the United States was the owner of the lands mentioned in the complaint. The answer (Record, p. 55) stated that the defendant had not sufficient information upon which to found a belief whether the allegations of the complaint, that the patents were procured by fraud, and that the patentees were myths or fictitious persons, were true or not. The answer (Record, pp. 55–57) also stated in substance that if such allegations were true, nevertheless the defendant was a purchaser for value without notice of any fraud. The answer (Record, p. 56) admitted the chain of title of the defendant as set out in the complaint. It denied (Record, p. 55) that said David H. Moffat, Jr., or his grantees, or any of them, received their deeds with knowledge or notice of any fraud; averred (Record, pp. 56–7) that said Sidney

Dillon was a purchaser for value and received the title to said lands without knowledge or notice of any fraud; that he caused the title to be examined by reputable attorneys before he purchased the lands, and it was reported good; that neither he nor his said attorneys had any notice or cause to fear that such title was assailable for any reason until the beginning of this suit; that what is true in this respect as to said Sidney Dillon is also true as to this defendant, which derived its title from him upon the strength of the examination made by said attorneys and without any knowledge whatever of any fraud or wrong in any steps by which title passed from the Government, or of any defect whatever in said title. That defendant purchased in good faith and for value, and without notice of any fraud. The answer (Record, p. 57) also set up the defense of laches on the part of the Government. It also called for strict proofs as to all the allegations of the bill of complaint, and asked that it be dismissed with costs.

REPLICATION.—The complainant filed its replication, joining issue in the usual form July 20, 1887 (Record, p. 58).

THE EVIDENCE.—*The proofs taken on the part of complainant* consist of depositions of seven witnesses (Records, pp. 65–98), who had resided at distances from the land described in the complaint, at various periods of time, who testified that they never knew any of the pre-emptors named, and that so far as they knew no improvements were made on the land before the date of the patents. There was also evidence (Record, p. 98,

et seq.), by Certificates of Entry from the General Land Office, showing that at the the time of entry of the said lands Louis Dugal was Register, and Cyrus H. McLaughlin was Receiver, at the United States Land Office, in Denver, and that part of said lands were within the Denver District; and showing further that part of the lands were paid for in scrip issued to the State of Tennessee, and part in cash; that the applications to enter, the necessary affidavits of applicants, together with the necessary proofs of witnesses as to the occupation and improvement of the lands, were all in due form, and at proper dates, taken before C. H. McLaughlin, the Receiver of the United States Land Office at Denver, and showed the personal presence of such witnesses at the time and place of the taking of such proofs. These are set out at length in the Record, at pages 99–136, as to each piece of land. It was stipulated by the parties to the suit that the rules and regulations of the General Land Office of the United States, as set out in the complaint, were to be taken as true and correct, without special proof thereof (Record, pp. 98–99). There was also in evidence (Record, pp. 138–144) a certified abstract of title compiled from the county abstracts by the county clerk, showing the chain of title of defendants substantially as alleged in the complaint and admitted in the answer.

On the part of the defendant the deposition of Sidney Dillon was taken (Record, pp. 58–62), showing that he purchased the lands in question and paid full value therefor; that before purchasing he consulted counsel and caused the title to the lands to be examined by attorneys, who reported that the title was good; that he purchased relying upon their examination and re-

port; and that he purchased the lands in good faith, and without any notice or knowledge whatever of any fraud or of anything wrong in the original procuring of the said lands from the Government.

The testimony of Louis Dugal and Cyrus H. McLaughlin, the Register and Receiver of the Denver Land Office at the time of the alleged fraud, was not taken or called for by complainant, and no excuse was offered for not calling them or either of them. There was no evidence whatever tending in any degree to implicate either of them in any fraud or conspiracy.

We find no assignment of errors in the record as required by the statute and by the rules of this Court.

ARGUMENT.

The complainant, the United States, must take one or the other of two positions—*either*, first, that the legal title to the land in question is in the defendant, The Union Coal Company; *or*, second, that the legal title is in the United States. We proceed to show that the first of these two positions is the correct one; and that, even if the fraud be admitted as alleged in the complaint, yet the defense of purchaser for value without notice is perfect. The complaint moreover of necessity admits that the legal title is in the defendant, for on any other assumption the complainant would have a complete and adequate remedy at law by an action of ejectment (*Lea vs. Polk County Copper Co.*, 21 How., 493, 497, and cases *infra*, Point III.).

We consider the case now in regard to the first of these two alternative positions, and later consider it with reference to the second.

The complainant cannot blow hot and cold. It will not be heard to allege that the title is in the defendant, and also, in the same complaint, to allege that the title is in itself. Further, if the complainant were to allege that the legal title is in itself it would put itself out of Court by its own allegation, for it would in that case have a complete and adequate remedy at law by an action of ejectment; and, as will be seen from an examination of the complaint, there are no allegations in it to show that if the legal title be in the United States, an action of ejectment is not a complete and adequate remedy. A careful consideration of the complaint, moreover, shows that it was intended to allege, and does allege, that the legal title is in the defendant. The complaint alleges (Record, p. 1, *et seq.*) that in May, 1870, the title was in the United States. That about that time one R. R. McCormick and certain other persons formed a fraudulent and illegal scheme to procure from the United States patents for the lands in question. The complaint then further alleges the due performance of all the acts and conditions precedent to the issue of the patents; that such acts and conditions were performed in a manner regular upon their face, but were nevertheless fraudulent. The complaint then alleges the issue of the patents in due form to certain persons named as patentees. Note that there is no allegation that these patents did not convey the legal title. The sum and substance of the allegations is that the patents were regularly issued, but that their issue was obtained by

fraud; and the assumption throughout the whole bill of complaint is that the title none the less passed. The complaint then alleges (Record, pp. 42–45) that these persons named as patentees in the patents—*note that this allegation is made without any qualification whatever*—by deed duly recorded, conveyed the said land to David H. Moffat, Jr. Here is an unqualified allegation that these patentees (no allegation here that these patentees were myths or fictitious persons), conveyed this land to one of the intermediate grantees. This is a clear and unequivocal allegation that the *legal title* was conveyed by these patentees to David H. Moffat, Jr. The complaint further alleges that David H. Moffat, Jr. conveyed to the Colorado Coal Company and to the St. Louis and Denver Land and Mining Company, and that these intermediate grantees conveyed to Sidney Dillon, trustee; and that Sidney Dillon, trustee, conveyed to the Union Coal Company. *The allegation with reference to all these conveyances is made without any qualification or explanation whatever.* As it stands, therefore, it is an allegation of the conveyance of the *legal title* to the defendant the Union Coal Company. But, even if it could be contended that the legal title is still in the United States, then the complaint states no case for a court of equity; for no facts whatever are stated therein to show that it has not in that case a complete and adequate remedy at law by an action of ejectment. The *complaint*, therefore, must be taken as alleging that the legal title is in the defendant.

FURTHER, THE TESTIMONY (Record, pp. 65–98), taken in the case, shows clearly that the case was tried and heard

on the hypothesis that the legal title is in the defendant. This testimony was introduced for the purpose of showing that no settlements or improvements were made upon the lands as required by law, and that, so far as the witnesses knew, no persons bearing the names of the patentees lived on these lands. This, if true, tended to show that there was fraud in obtaining the patents for the lands. It did not show or tend to show that the patents were not issued to the persons who were named as patentees, or that these patents failed to convey the legal title.

With this introductory argument we proceed to consider the distinct points.

I.

Even if there was fraud, as alleged in the complaint, the defendant was (1) a purchaser in good faith; (2) for value; (3) without notice of the fraud; and a court of equity will not grant any relief against the defendant as such innocent purchaser.

All the questions that can possibly be raised in the present case have already been decided adversely to appellant in the case of *Colorado Coal Co. vs. United States*, 123 U. S., 307. A citation of that decision would really be a sufficient argument on behalf of the

appellee in the present case. We proceed, however, to show briefly that the present case is covered by that decision, and that upon it, as well as upon the general principles of law, the decision of the Circuit Court in the present case was correct.

The material parts of the present case as to this point were briefly as follows: There was evidence tending to show that there were in fact no actual settlements or improvements upon the lands (Record, pp. 65–98), and that the affidavits, proofs and certificates made in preempting the lands were false and untrue in alleging that such settlements and improvements existed (Record, pp. 98, *et seq.*). Several witnesses also testified (Record, pp. 65–98) that they were acquainted with the people living in the vicinity of the lands in question at the time of the preemption of said lands, and that they did not know any of the persons named as preemptors or as witnesses in the matter of their applications, and did not know of the existence of any such persons.

On the other hand, it was shown that on their face all the proceedings and documents to obtain the patents were regular and conformed to law and to the rules and regulations of the General Land Office (Record, pp. 2–3, 98, *et seq.*), and that patents were issued in regular manner according to law to the persons named as preemptors (Record, pp. 98, 138, *et seq.*). It was also shown by the testimony of Sidney Dillon (Record, pp. 58–62) that he purchased the lands in good faith, for value and without notice of any fraud; and both by his testimony and by the documentary evidence it was proved that he subsequently sold and conveyed to the defendant the Union Coal Company, and no attempt

even was made to contradict this testimony; and there was no evidence tending to show that either the defendant or said Sidney Dillon or any of the intermediate grantees had any notice or knowledge whatever of any fraud.

Upon these facts, even if the evidence be deemed to have fully established the fact that there were no actual setlements and improvements upon the lands in question, and that the affidavits, &c., were false in this particular, yet the legal title, nevertheless, passed from the United States to the patentees, and through them and subsequent grantees to the defendant, as alleged in the complaint and admitted in the answer; and, inasmuch as the defendant (1) is a *bona fide* purchaser for value without notice of any fraud, and further (2), is also a purchaser from Sidney Dillon who was likewise a *bona fide* purchaser for value without notice of any fraud, therefore the complainant, even if there were no actual settlements or improvements, is entitled to no relief against the defendant; the defense of a *bona fide* purchaser for value without notice is perfect. This is in accordance with the well-settled rules of equity jurisprudence. It is unnecessary to cite authorities to show the general rule, that a court of equity will not grant relief against a *bona fide* purchaser for value without notice. In the present case there is also the additional fact that, the defendant is a grantee from a purchaser for value without notice, namely, from Sidney Dillon (Record pp. 58–62); and, as such grantee, is protected equally with him against any attack upon the title, because of the alleged fraud of certain persons in procuring the patent. This general rule is also well settled.

In *Bumpus vs. Platner*, 1 Johns. Ch., 213, Chancellor KENT said (p. 219):

"It is a well settled rule of this Court, that a man who is a purchaser, with notice himself, from a person who bought without notice, may protect himself under the first purchaser. The reason is to prevent a stagnation of property, and because the first purchaser being entitled to hold and enjoy, must be equally entitled to sell" (citing cases).

To the same effect are:

Hill on Trustees, p. *165.
Lewin on Trusts, 859–860.
1 Story Eq. Juris., § 409.
1 Perry on Trusts, § 222.

The present case is exactly covered by *Colorada Coal Co. vs. United States*, 123 U. S., 307, *supra*. Mr. Justice MATTHEWS, delivering the opinion of the Court, said (pp. 313, 314):

"It is fully established by the evidence that there were, in fact, no actual settlements and improvements on any of the lands as falsely set out in the affidavits in support of the pre-emption claims and in the certificates issued thereon. This undoubtedly constituted a fraud upon the United States sufficient in equity, as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. *But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value without notice is perfect.* * * *

"It is, indeed, an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value."

That the patents passed the legal title, even if the alleged fraud existed, see also

United States vs. Stone, 2 Wall., 525–535.
Johnson vs. Towsley, 13 Wall., 72–83.
Moore vs. Robbins, 96 U. S., 530, 533.
Smelting Co. vs. Kemp, 104 U. S., 636.
United States vs. Minor, 114 U. S., 233.
Wright vs. Roseberry, 121 U. S., 517.

We proceed now to show that the legal title is in the defendant, the Union Coal Company.

II.

The legal title to the lands in question is in the defendant, the Union Coal Company. The only ground upon which it could possibly be contended that the title is still in the United States is that there were in fact no patentees. But on this point the complainant utterly failed to make out any case to show that such was the fact.

The bill of complaint alleges

"That the said conspirators or some of them aforesaid, being in possession of the said agricultural college scrip No. 1443, and having determined to secure title to certain of your orator's public land by fraudulently pretending that the same had been settled upon, improved and possessed by a person entitled to pre-empt

the same, and to further carry out and effect the objects of the conspiracy aforesaid did, on the 26th day of November, 1870, or thereabouts, write out, sign and execute, or cause to be written out, signed, and executed, a certain application in the name of, or purporting to be in the name of, a person calling himself or called Royal Duff, to make final proof, entry and payment upon and for the N. E. 1/4 Sec. 4, T. 1, N., R., 68 W., County of Weld, and State of Colorado, as a pretended settler and pre-emptor and did further write out, sign and execute, or cause to be written out, signed and executed in the name of or purporting to be in the name of the said person calling himself or called Royal Duff a certain paper and affidavit which was or purported to be subscribed and sworn to before C. H. McLaughlin, Receiver of your orator's land office at Denver, Colorado," &c.

Here is an allegation that certain persons or a certain person made an application to make entry for part of the land in question, and that there was a certain paper and "affidavit which was or purported to be *subscribed and sworn to before C. H. McLaughlin*," Receiver of the Land Office at Denver. This, it will be perceived, is a distinct allegation that a person or persons, *not a myth*, made application and affidavit. It matters not whether the application was fraudulent and false or not; the allegation is that the application was made and that the affidavit was made. It is alleged further that the affidavit was or purported to be subscribed and sworn to before C. H. McLaughlin, the Receiver of the Land Office. If no person made this application, if no affidavit was made, nothing would have been easier than to have called C. H. McLaughlin, the Receiver of the Land Office, as a witness, and have proved by him that the affidavit which purported to be subscribed and sworn to before him was not so subscribed and sworn to, and that no person appeared and made the applica-

tion. *But the complainant not only did not call McLaughlin as a witness, but presented no excuse whatever for not calling him.*

The complaint alleges further that the said pretended application was filed, and that—

"The said conspirators or some of them, in the way of final proof of the right of the said pretended Royal Duff to make said pre-emption entry, did write out, sign, and execute or caused to be written out, signed, and executed a certain other paper, deposition, and affidavit, which was or purported to be an affidavit of a certain person calling himself or called Paul Lingen, whom it was pretended was a witness for the said pretended Royal Duff, said affidavit having been subscribed and sworn to before C. H. McLaughlin, Receiver of your orator's Land Office, at Denver, Colorado," &c.

Here follows the affidavit as to the facts of settlement, and an allegation that the affidavit contained statements as to the fact of settlement and improvement by Royal Duff upon said part of the land in question.

If no such person as Paul Lingen appeared before C. H. McLaughlin, the Receiver of the Land Office, and if he did not subscribe and swear to the affidavit, as the affidavit purports to be subscribed and sworn to by him before the said McLaughlin, then this fact might easily have been proved by the complainant calling the Receiver McLaughlin as a witness and having him so testify. Yet, as already stated, he was neither called nor was any excuse offered by complainant for not calling him.

The complaint then further alleges (Record, p. 5) that these affidavits were filed with the Register and Re-

ceiver of the Land Office in pursuance of the Acts of Congress, and the rules and regulations aforesaid.

The complaint then further alleges (Record, p. 6) the issue in due form of the patent in the name of the said pretended Royal Duff for part of the land in question. The complaint then further alleges that the statements and allegations in said application, affidavits and proof were totally false, fraudulent and untrue; that no such person as Royal Duff had any dwelling-house or other improvements on the land, and that the said pretended Royal Duff was not a citizen of Weld County at all. It then further charges and alleges (Record, p. 7):

"That the said pre-emptor Royal Duff, and his pretended witness, Paul Lingen, were myths and fictitious persons, and that their said names were fictitious, and that no such persons of such names have ever lived or been known in said Weld County at any time. And that if such affidavit and proofs were ever made and sworn to by any one, as they purport to have been, they were so made and sworn to by persons falsely pretending and representing themselves to be Royal Duff and Paul Lingen, and that the same was done at the instance of said R. R. McComick and those acting and conspiring with him."

Substantially the same allegations are made (each set of allegations occupying about three pages, Record, pp. 4–42), in respect to each of the said sections of land described in the first paragraph of the complaint (Record, p. 1).

The complaint then further alleges (Record, p. 42)—*and this allegation is made absolutely and* WITHOUT ANY QUALIFICATION OR EXPLANATION WHATEVER—that:

"On or about, to wit, the 28th day of November,

1870, the said Royal Duff, by deed bearing date that day, and duly recorded in the County of Weld and State of Colorado on the 14th day of December, 1870, conveyed to David H. Moffat, Jr., Trustee of the Denver Land Association, the N. E. ¼ Sec. 4 T., 15 N. R., 68 W., in the County and State aforesaid."

This is a distinct and unequivocal allegation that the said Royal Duff conveyed the said quarter section to David M. Moffat, Jr., Trustee. There is no allegation here that the said Royal Duff was a myth, but the allegation is of necessity an allegation that Royal Duff was a real person; for he could not have made a conveyance unless he was a real person, and the allegation is absolute and unqualified that he *did* make a conveyance.

Then follow (Record, pp. 42–44) similar clear and unequivocal allegations that each of the patentees of the lands in question, by deeds duly recorded, conveyed the other parts of the said lands to David H. Moffat, Jr., Trustee. There is no allegation here that any of these patentees were myths or fictitious persons; and, as has already been stated, the allegation that they conveyed the lands is, on the contrary, an allegation that they were *real* persons.

So much for the *allegations of the complaint* with respect to the point that there were no patentees. We now proceed to examine the evidence on this point.

The Evidence. The evidence consists of the testimony of seven witnesses and certain exhibits and stipulations. We purpose to take up the testimony of each of these witnesses and to show its substance and its bearing upon the question as to whether there were

no patentees. Before proceeding in the testimony it is worth while to note that this testimony was given in the latter part of the year 1887, while the facts in reference to which the testimony was taken occurred more than seventeen years prior to that date, namely, in the early part of the year 1870. During that time many changes had occurred, and this must have been especially true in a new and growing country like that of Weld County, in which the lands in question are situated. Men must have come and gone, and passed out of the recollection of the inhabitants in those seventeen years. It will be seen from an examination of the testimony that a long list of names of the patentees was presented to the witnesses and they were asked whether they had known, in that County, any persons bearing those names, and the answers were that they had not. But suppose all those patentees lived in Weld County in 1870 and prior thereto, it would not be at all surprising if, at the end of seventeen years, when a list of their names were presented to a witness, he should say, and say truly, that he did not recollect any of them. It would not be strange if, at the end of that long period of time, the witnesses should have forgotten even the faces of the men who bore these names, much less strange that they should have forgotten the names themselves, for it is a well-known fact that names of persons pass out of one's mind much more readily than faces.

It must be borne in mind also that *the testimony of these witnesses has reference only to the locality of Weld County.* For all that appears by the testimony of these witnesses the patentees may have been real persons liv-

ing in some other part of Colorado, or in a neighboring State or Territory, or elsewhere in the country, and may have appeared before the Register and Receiver of the Land Office, made the applications and affidavits (even if these applications and affidavits were false), and may have been the real persons bearing the names in which the patents were issued.

The testimony, therefore, of all these witnesses conceding it all the weight which it could by any construction be entitled to, does not prove or even tend to prove that there were no such persons as those named as patentees in the patents of lands in question.

It will be seen further that the testimony of all these witnesses is extremely vague, and for the most part hearsay testimony. The only direct testimony which they give is to the effect that there were no settlements or improvements on the lands, and that, so far as they knew, no persons bearing the names of the patentees lived on the lands or in that vicinity. *None of the witnesses testified to any direct knowledge as to how the patents were obtained or to any fraud in the matter.*

Henry Briggs testified (Record, p. 65–83) that he first heard, in 1868, of Sections 4, 8, 10 and 14 in Township 1 north of Range 68 west, the sections in controversy. He said, in substance, that the men who first spoke to him were J. S. Wells, Ransom Balcomb and Kattell. They wanted him to go to Denver and see the Land Agent, Mr. Clements, and Mr. E. C. Holmes, and take steps to acquire the lands; that Mr. Holmes and Mr. Clements were Register and Receiver in the United States Land Office at that time; that he would not do so because he understood it was

going to be a fraudulent transaction; that he told Wells that he would not go any further in it; that it was in 1871 that he first heard that sections 4, 8, 10 and 14 had been entered for patents (Record, p. 70); that J. S. Wells told him. On the cross-examination *Briggs testified* (Record, p. 77, bottom) *that nearly all or a good deal of his information came from Wells.* He testified also (Record, p. 76), that this man J. S. Wells was living in Binghampton, New York, the last he heard of him, which was about two years prior; that several of the other men were dead; that Wells and himself were about the only ones left. *Notwithstanding this testimony of Briggs, which directly implicated Wells in the fraud—if fraud there was—the Government, so far as appears from the record, made no effort to call Wells as a witness or to procure his deposition.* Yet the facts as to the fraud, if Briggs' testimony is to be believed, were within the knowledge of Wells. No explanation or excuse was offered for not calling Wells, or having his deposition taken as a witness. Briggs testified also in substance that he was well acquainted with the people of that section of the country from 1861 to 1873 (Record, p. 73); and that, so far as he knew, none of the men bearing the names of the patentees in the patents lived on the lands in question or in that section of the country.

Joseph Mitchell, a witness for the complainant, testified, in answer to the question: "Do you remember the time they (that is, the lands in question) were entered and proved up; do you know about that? A. No, sir;" thus testifying that he himself had no knowledge as to the alleged fraud in entering the land. There

was shown to the witness a paper containing the names of Royal Duff and others who were named as patentees. He was asked to examine the list and state whether he knew of any such men as these or any of them. He said in answer that he had never heard of the names before. He also states (Record, p. 85) that, so far as his knowledge goes, the names of the parties on the list he should think were fictitious persons. He also states (Record, p. 85) that he had a conversation with one Harry Hill in reference to these lands as to how they were acquired; that it was generally understood that they were taken up fraudulently. *Note again here that the complainant did not call this man Hill as a witness,* or present any excuse for not doing so. It did not show that he was dead or inaccessible as a witness. Mitchell also testified that he had a talk with one McDowell in regard to this land as to how it had been acquired (Record, p. 86); that in the conversation McDowell impressed him as to being very fully advised in regard to the entries. Note again that the complainant failed to call McDowell, who, according to the testimony of Mitchell, seemed to be very fully advised in regard to the entries, and no excuse was offered for the failure to call McDowell or to have his deposition taken as a witness.

S. J. PLUMB was also a witness for the complainant. He testified (Record, p. 89):

"Q. To the best of your knowledge and acquaintance with the people in that section of Weld County are the parties whose names are contained in that list (the patentees) real or fictitious? A. They are fictitious, so far as living in that part of the country. They may have been real men in some other part of the country."

The last part of the answer of this witness is worthy of note, as it contains a statement which is not only self-evident, but which is perfectly consistent with all the evidence that was given in this case. And if the patentees were real men, living in some other part of the country, even if they did commit fraud in obtaining the patents, nevertheless the legal title passed to them. The witness S. J. Plumb also testified that *he knew nothing in regard to the facts connected with the entry of these lands* (Record, p. 90); that all he knew about it was hearsay.

GEORGE F. KEYES testified as a witness for the complainant. He stated that he did not know any one bearing the name of any in the list of patentees; that so far as he knew none of the parties by these names lived in Weld County (Record, p. 92); that *he never knew positively, but only from hearsay, how this land had been entered for patent.*

Similar testimony was given by JOHN C. BAILEY (Record, p. 94) and by JOSEPH R. BAILEY (Record, p. 96). This last witness also testified: "*They* (persons named in the list), *may be real, but I think they are fictitious* SO FAR AS LIVING IN THAT PART OF THE COUNTRY *is concerned.*" WILLIAM CLARK also testified in a similar manner (Record, p. 97.) He stated also that he did not know anything of his own knowledge concerning the entries of these lands for patents.

This is in substance all of the testimony introduced by the complainant, and it is on this testimony alone that it seeks to cancel and annul the patents to this 2240 acres of land, and, this, too, as against a pur-

chaser for value who had no notice of any alleged fraud. It is submitted with perfect confidence that this testimony is wholly inadequate for any such purpose. *First*, because the testimony itself does not show, or even tend to show, that there were not in existence some real persons whose real names were those named in the patents, nor does it in any degree tend to show that these real persons did not present the applications, proofs and affidavits, and obtain the issuance of the patents. True, these affidavits and applications may have been false and fraudulent; but, if the patentees were real persons, the title nevertheless passed to them and, through the subsequent grantees, to the defendant The Union Coal Company. There is not, in the testimony given in this case, a scintilla of direct evidence to show that no such persons existed.

Second. If there were no patentees the Register and Receiver of the Land Office at Denver must have known this fact. Yet the complainant neither called these persons as witnesses, nor presented any excuse for not calling them.

This fact alone, within the rule in *Col. Coal & Iron Co. vs. United States*, 123 U. S., 307, is sufficient to dispose of this case. When the Government seeks to cancel and annul its own solemn assurances of title, and seeks to do it on the ground that no persons existed as grantees, and this fact, if true, is within the knowledge of its own officers and agents, and it fails to call as witnesses those officers and agents, no court of equity will

for a moment listen to these allegations that no such grantees existed.

There was introduced in evidence (Record, p. 98) Exhibit No. 14, which is set out at length (Record, pp. 138 to 144), being the abstract of title to the lands in controversy. This abstract shows a regular chain of title, the instruments being the patents and subsequent conveyances in regular form and duly recorded of the lands in question. It will be seen by an examination of the deeds made by the patentees that they were duly acknowledged before Notaries Public (Record, p. 139). For example, the Warranty Deed in which the grantor was Royal Duff, and the grantee David H. Moffat, trustee, the acknowledgment was taken November 28th, 1870, before William K. Townsend, Notary Public, Weld County, Colorado. *It is nowhere alleged in the complaint, nor does it appear anywhere in the record or proceedings, that this William K. Townsend was not a real person. If so, then* THE DEED CONTAINS HIS CERTIFICATE, UNDER SEAL, THAT ROYAL DUFF PERSONALLY APPEARED BEFORE HIM AND ACKNOWLEDGED THE DEED. If no such person appeared before William K. Townsend, then it would have been easy to establish that fact by calling Townsend as a witness and having him so testify. Yet he was not called as a witness, nor was any excuse presented for not calling him. See also the quit-claim deed mentioned about the middle of the page (Record, p. 140), in which the grantor was Alfred Rollins, and the grantee was David Griggs. The acknowledgement purports to have been taken June 10, 1870, before John W. Ratcliffe, Notary Public, Gilpin County, Colorado. There is no allegation anywhere in the complaint, or anything in the record or proceedings

to show that John W. Ratcliffe was a myth, or that he was anything but a real person. His acknowledgement must have contained a certificate that Alfred Rollins, the patentee, appeared before him and acknowledged the deed. If this was not the fact, the complainant should have called Ratcliffe as a witness, and have had him so testify. But it neither called Ratcliffe nor offered any excuse for not calling him. The other deeds bear similar acknowledgments.

Not only did the complainant fail to call the Notaries before whom these deeds were acknowledged by the patentees, but it *failed also to call any of the grantees of these patentees*, and yet if the patentees were myths their grantees must have known, or would have been likely to know this fact. David H. Moffatt, Jr., to whom many of these conveyances were made, was not called as a witness, and no excuse was presented for not calling him. It will thus be seen that the complainant wholly failed to call as witnesses the very persons who, if there were in fact no patentees, must have had certain and peculiar knowledge of this fact, and no excuse was made for failing to call such persons as witnesses.

Both the pleadings and the evidence, therefore, not only fail to show that there were no patentees, and fail in any degree, to rebut the presumption that there were patentees as the instruments show, but on the contrary, they strengthen and confirm this presumption.

This precise question has already been fully con-

sidered in *Colorado Coal Co. vs. United States*, 123 U. S., 307, *supra*, and decided adversely to any such claim as that made by appellant in the present case. The only difference between that case and the present one in this respect is, that in the present case the facts are much stronger against the appellant. In *Colorado Coal Company vs. United States*, *supra*, Mr. Justice MATTHEWS giving the opinion of the Court, stated the facts and the decision of that case upon this point, as follows (pp. 314–316):

"*Hence, it becomes necessary to support the decree of the Circuit Court, to maintain, as that Court declared, that the legal title to the lands in question, did not pass from the United States by virtue of the patents, because there were, in fact, no grantees.* And it was that proposition of fact which, by the proofs introduced into the cause the United States undertook to establish. The evidence on that point is found in the dispositions of fourteen persons examined as witnesses. They were called to prove, and did prove, in the first place, in respect to the several tracts of land in controversy, the fact that they had had not been settled upon and that no improvements had been made upon them by any person. They also testified, in substance, that they were acquainted at the time of the transactions, with the lands, and were acquainted with the people then living in Las Animas County, some of them stating that they knew every white man residing at that time therein; that with the exception of one person named Martine, there were no persons in the county at the time bearing the names specified as pre-emption claimants, and no persons bearing the names subscribed as witnesses to their statements; and that they never saw or heard of persons residing in the county having such names.

* * * * * *

"It certainly does not follow that no such persons in fact existed, as a necessary conclusion from the testimony of these witnesses that they knew no such persons as named in these papers. The utmost that can

be said, as was said by the learned Judge of the Circuit Court in delivering judgment in the case, is, that 'if none of them were ever in the county and no improvements were ever made upon the land, then the proofs upon which the patents issued were false; and the inference that the papers were manufactured without the presence of any persons bearing or assuming the names of the patentees is not more unreasonable than would be the inference that sixty-one actual persons committed perjury themselves, and suborned as many others to perjure themselves as witnesses in order to acquire the title.' This, it is argued, establishes at least that it is more probable that the grantees were fictitious than they were real persons, and that, in view of the difficulty if not the impossibility, of proving the negative proposition that no such persons existed, and of the fact that the defendants connect their title and right with a transaction which must have occurred with these grantees if they had an actual existence, the burden of proof is shifted from the United States to the defendants, and that as the latter introduced no evidence tending to show the fact as they claimed it to be, the case of the complainants must be considered as established by a preponderance of proof."

The learned Justice then proceeds to consider the question of the burden of proof and character and degree of proof necessary in such cases, and shows that when the patent has issued the presumption is that the laws and the rules and regulations of the Land Office and all other necessary things have been complied with, and that, in order to overcome the presumption, the evidence must be clear, unequivocal and convincing. He says (pages 316 and 317):

"We have had recent occasion to consider the question of the character and degree of proof necessary in such cases to invalidate titles held by purchasers in good faith for value, and without notice, under patents issued by the United States. In *The Maxwell Land Grant*

Case, 121 U. S. 325, 379, 381, it is said: 'the deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the Court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided. * * * We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal? In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authorative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.'

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact, which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary—clear, convincing and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish."

The learned Justice then cites authorities showing that the burden of proof is upon the Government to show conclusively that the patentees were not real persons. He says (p. 319) of the facts in that case, which in this respect were almost identical with the facts in the present case, except that *in the present case*, as above stated, *no conspiracy is alleged between the Register and Receiver of the Land Office and the patentees, and no fraud of any kind on the part of the Register or Receiver.*

"In the present case the facts shown are, in our opinion, not sufficient to overcome the presumption of innocence on the part of the Register and Receiver of the Land Office. [No charge against the Register and Receiver in the present case.] It is quite consistent with these facts that real persons, whether under their own or under assumed names, did actually appear before them and make pre-emption claims. [True in present case.] There is no testimony whatever tending to establish directly any complicity on their part with the fraud which may have been practised upon them and not through them. [True in present case.] It is certain that there were real persons acting in the matter. [True in present case.] The purchase price due on the entry of the lands was in fact paid. [True in the present case.] There is no proof of any actual fabrication of the papers, the genuineness of which is not negatived by any internal evidence. [True in present case.] The allegations in the bill that they were, in fact, manufactured by the Register and Recei-

ver and Hunt, or by any one with their connivance, are entirely unsupported by direct evidence. [No direct evidence in present case.]

"It is alleged in the bill also that 'by the rules and regulations which then and since have governed it in the issue of patents for land located with agricultural college scrip, no patent was issued by your orator except on presentation at its General Land Office, by the person making such location, his agent or his assign, of the duplicate certificate as aforesaid delivered to the locator for the land for which a patent is claimed,' and 'that after the forwarding by the said Stanton and Cook of said supposed proofs of pre-emption, said agricultural college scrip, said money, said non-mineral affidavit, and said duplicate certificate, in each of the said pretended pre-emption claims as aforesaid mentioned, to your orator's General Land Office at Washington, the said Alexander C. Hunt, pretending to act as agent of each of said supposed pre-emptors, presented to the officers of the General Land Office such other duplicate certificate of location, and requested said officers to cause a patent for each of the said several pieces of land to issue from your orator to the said supposed persons in each case purporting to claim and apply for the same.' And it is added that the officers of the General Land Office, confiding in the honesty of the Register and Receiver, and believing the statements contained in the proofs to be true, did issue its patents therefor."

In that case also, as in the present one, the United States failed to call as witnesses the Register or Receiver of the Land Office in order to prove the alleged fraud by their testimony. In that case the United States attempted to offer an excuse for not calling the Receiver and Register, in order to prove the alleged fact that the patentees were myths and not real persons; but in the present case not even an excuse is offered. Mr. Justice MATTHEWS (giving the opinion of the Court) shows that these witnesses should have been called and their testimony taken. In the present

case no charge of fraud was made against the Receiver or Register. The present case is therefore stronger than *Coal and Iron Co. vs. United States, supra.* On this point he says (pp. 720–1):

"Neither do we think the reason assigned as an excuse on the part of the Government for not calling the Register and Receiver as witnesses is valid or satisfactory. One of them, it was said at the bar, had died. But the other might and ought to have been examined. He was one of its own officers, through whom the Government had received the price of the lands sold, and which it has ever since retained. If his official conduct was impugned, nevertheless his misconduct, if proved, was not imputable to the defendants, and they should not be prejudiced by the odium of an accusation against him. The United States had trusted him, and, inspired by that confidence, the defendants also had relied upon his official acts. In this faith they had paid full value for what they had reason to believe was a perfect title. They were not accused of any complicity with, nor had they any knowledge of, the fraud charged. In the absence of direct proof of his guilt, the Government could not properly treat the defendants as his confederates, nor deprive them of any defense which as a witness he might be able to make for himself. The United States had no higher interest at stake than to establish the truth and justice of the transaction. It was due from it to these parties, whose estate this suit was instituted to defeat, to produce and examine as witnesses those who must have had the best knowledge of the facts, so as not to force the defendants to explanations which, by the very theory of their innocence and ignorance, they were incapable of making. To raise a suspicion, however strong, of the fraud and wrongdoing of its own officers is not enough to justify the Government in casting upon the defendants the burden of establishing their title."

The present case falls directly within the decision in *Colorado Coal Company vs. The United States, supra,* except that in the present case the facts are stronger against the appellant. The bill of complaint in the

present case itself shows that the persons named therein as patentees were real persons and not myths or fictitious persons; for, while the bill alleges that they were myths, it afterwards avers, without qualification, limitation or explanation, that these several persons did make, execute and deliver deeds to the land. The evidence introduced by complainant also shows that in every instance the respective persons named as pre-emptors and patentees appeared before the Register and Receiver of the Land Office in person and made the necessary affidavits, proofs, applications and payments for the lands and that the patents were issued in due course. It is neither alleged in the complaint nor proved by evidence that real persons did not appear before the Register and Receiver and make the affidavits, proofs, &c., as above stated. On the contrary, both the complaint and the evidence show that real persons did thus appear. The Register and Receiver of the Land Office, who would have known if the patentees were not real persons, were not called as witnesses and did not testify in the case. The notaries who took the acknowledgments of deeds by the patentees (the alleged myths) were not called as witnesses, neither were the grantees of the patentees called, though both these notaries and these grantees must have known if the patentees were myths. The record fails to show that there was any effort made to obtain the testimony of any of these persons, and fails to show any excuse for not obtaining it. As a matter of fact, as we are informed, both the Register and Receiver were alive at the time of this suit and resided in Denver and their testimony could easily have been procured.

Another important feature in which the present

case is stronger. In the case of *Colorado Coal Company vs. The United States supra*, a conspiracy was charged between the Receiver and the Register and certain other persons in obtaining patents, and the fact of this alleged conspiracy was urged in that case as an excuse for not calling the Register and Receiver as witnesses, but the Court held that even such an excuse was not sufficient and that the testimony of these officers should have been taken. (See Report, pp. 320-321). In the present case no charge of any kind is made against the Register and Receiver of the Land Office. On the contrary, the Bill of Complaint expressly alleges that all the affidavits, proofs, applications, payments, &c., were made by certain persons before the said officers. It is evident therefore that the appellant in the present case has no excuse for failing to call the Register and Receiver as witnesses in order to prove, if possible, the facts to support its case. In the absence of any proof by appellant as to the facts it alleges the rule of law is clear that when a patent has issued it is presumed that the officers charged with the duties preliminary to the issue of the patent have performed these duties as required by law.

In *Lea vs. Polk County Copper Co.*, 21 How., 493, Mr. Justice CATRON said (p. 497):

> "Then the presumption comes in, that, as a public officer, the Register did his duty, and he who impeaches the act as illegal must prove the allegation. * * * Then, again, all the incipient steps authorizing the Register to issue the grant, the Governor to sign it, and the Secretary to attach the great seal, are presumed as having been regular, nor was the purchaser required to look behind the patent" (citing *Bagnall vs. Broderick*, 13 Pet., 448).

This is a presumption which cannot be overcome except by clear and direct proof, and the burden of proof, including the proof of a negative, if necessary, is upon the complainant, as was stated in Colorado Coal Company vs. United States, *supra*. No such proof was given in the present case.

The United States, therefore, wholly failed to establish the fact that there were no patentees; and hence the legal title is in the defendant, the Union Coal Company, as the instruments purport to have conveyed it. But, even if we are mistaken in this, we proceed also to show other grounds of defense.

III.

If on the other hand it be contended by the appellant that the legal title is in the United States, then the only remedy is an action of ejectment in a court of law; and in that event this Court, as a court of equity, has no jurisdiction of the case.

We have already shown in this brief, *supra*, that the bill of complaint is a bill which assumes that the legal title to the lands in question is in the defendant, the Union Coal Company, and seeks to cancel and annul the various instruments which conveyed that title from the United States through mesne grantees to the Union Coal Company on the ground of fraud. There is no allegation in the bill of complaint nor any evidence that the legal title is in the United States.

But if we assume, for the sake of the argument, that the legal title is in the United States, then the remedy and the only remedy of the United States is by an action of ejectment in a court of law. Nothing is alleged in the bill of complaint, nor is there any evidence to show that if the legal title is in the United States there is not a plain, adequate and complete remedy in a court of law. It is not alleged that the United States is in possession of the premises, or that the defendant is out of possession of the premises, nor are any other facts alleged which show that the United States has not a perfect remedy at law. If, therefore, it be contended that the United States has the legal title, then this suit becomes merely a suit to try the legal title, and a Court of law furnishes a plain, adequate and complete remedy in such a case by an action of ejectment; and it is well settled that a court of equity has no jurisdiction in such a case. This follows not only from the general principles of equity jurisprudence, but is so by special statutory enactment. The 16th Section of the Judiciary Act of 1789, 1 Stat. 82, Ch. 20, declares

"that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law."

This provision exists in the Revised Statutes in Section 723. It has been many times decided by this Court that under the general rule of equity, and under this express statute, a court of equity has no jurisdiction in a case to try the legal title to land, for in such a case a plain, adequate and complete remedy may be had at law. This question has recently been so decided by this Court in the case of *Whitehead vs.*

Shattuck, 138 U. S., 146 (1891), a case which is exactly in point. That was a suit in equity nominally to quiet title of plaintiff to certain real property. The bill alleged that the plaintiff was the owner of the premises; that notwithstanding his ownership and right to possession the defendants claimed title to it and were in possession holding the same; that their claim of title and right to possession was founded upon a pre-emption and homestead claim and entry thereunder, a certificate and a patent issued by the United States, also upon a subsequent deed. The plaintiff prayed that the certificate of entry, the patent for the land and the deed might be cancelled and annulled and the cloud upon his title thereby removed and the title to the premises be established and quieted in him. The defendants demurred to the bill on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy and adequate remedy at law by ejectment to recover the real property described, and that the complaint showed no ground for equitable relief. The demurrer was sustained and a decree entered dismissing the bill. From this decree plaintiff appealed, and this Court affirmed the judgment below. Mr. Justice FIELD, delivering the opinion of the Court, said (p. 150):

"The facts set forth in the bill of the plaintiff clearly shows that he has a plain, adequate and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: that the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. *If the owner in fee of the premises, he can establish that fact in an action at*

law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof.

"The sixteenth section of the Judiciary Act of 1879, 1 Stat. 82, C. 20, declared 'that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law', and this provision has been carried into the Revised Statutes in Section 723. The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England. The term 'speedy,' as used in the demurrer is embraced by the term 'complete' in the statute.

"The seventh amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment (*Lewis vs. Cocks*, 23 Wall., 466, 470; *Killian vs. Ebbinghaus*, 110 U. S., 568, 573; *Buzard vs. Houston*, 119 U. S., 347, 351). And so it has been held by this Court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury' (*Hipp vs. Babin*, 19 How., 271, 278). * * * The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

See also *Grand Shute vs. Winegar*, 15 Wall., 373.

There is also the additional reason stated by Mr. Justice FIELD, *supra*, why the United States, as a court of equity, has no jurisdiction in such a case. The 7th amendment of the Constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved." To hold that a court of equity could assume jurisdiction where there was a plain, complete and adequate remedy in a court of law, would be to deprive the defendant of this right of trial by jury which is guaranteed to him by the Constitution in all cases at common law. It has therefore been several times laid down as a rule by this Court:

> "That whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant had a constitutional right to a trial by jury."
>
> *Hipp vs. Babin*, 19 How., 271, 278.

See also

Whitehead vs. Shattuck, *supra*.
Lewis vs. Cocks, 23 Wallace, 466, 470.
Killian vs. Ebbinghaus, 110 U. S., 568, 573.
Fussell vs. Gregg, 113 U. S., 555.

In *Grand Chute vs. Winegar*, 15 Wall., 373, Mr. Justice HUNT says (p. 375):

> "The right to a trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it. It is in vindication of this great principle and as declaratory of the common law that the Judiciary Act of 1789, in its sixteenth section, declares 'that suits in equity shall not be sustained in either of the Courts of the United States in any case where adequate and complete remedy may be had at law.'"

Lea vs. Polk County Copper Company, 21 How., 493, is a case in point. That was a suit in equity which sought to have a patent reformed so as to be used in an action of ejectment, and the bill prayed that the Court might remove impending clouds from the complainant's title by declaring the titles of the respondents void. Mr. Justice CATRON, delivering the opinion of this Court (page 497), stated:

"The bill of necessity admits that the legal title was vested in William V. Lea in the grant as it now stands, as on any other assumption the complainant would have his remedy at law, and must be turned out of court."

The objection that there is a complete remedy at law is jurisdictional, and may be enforced by the Court at any time, though not raised by the pleadings.

In *Hipp vs. Babin*, 19 How., 271, 278, this Court says:

"This Court has denied relief in cases of equity where the remedy at law has been plain, adequate and complete, though the question was not raised by the defendants in their pleadings nor suggested by the counsel in their arguments" (citing cases).

Also in *Lewis vs. Cocks*, 23 Wall., 466, 470, it is said:

"In the present case the objection was not made by demurrer, plea or answer, nor was it suggested by counsel, nevertheless if it clearly exists, it is the duty of the Court, *sua sponte*, to recognize it and give it effect."

See, in addition to cases, *supra*:

Killian vs. Ebbinghaus, 110 U. S., 568, 574.
Parker vs. Manufacturing Co., 2 Black, 545.

Therefore, if the legal title is in the United States, the only remedy is an action of ejectment at law.

IV.

The appellant cannot maintain this suit to annul and cancel the patents and deeds to the lands in question, for the reason that the facts on which it seeks to do so if they be true occurred more than sixteen years prior to the date of the institution of this suit. Its claim, therefore, is stale. During these sixteen years important rights and equities have arisen based on the solemn assurances of the United States which it now seeks to cancel and annul. Large amounts of money have been paid by innocent purchasers on the faith of these instruments, and it would be unjust and inequitable now for the Court, at the instance of the United States, to set aside its own solemn assurances of title.

The fraud, if any, was committed in 1870, or prior thereto (Record, p. 1, *et seq.*). The bill of complaint was not filed until 1886 (Record, p. 1). No excuse is offered, as for example that the fraud remained undiscovered, for not bringing suit at an earlier date. The abstract of title (Record, pp. 138 to 144) shows that during these sixteen years the title passed through various hands, and that large sums of money were paid as consideration for the conveyances of these lands. The plaintiff alleges (Record, p. 42–45), and the abstract of title also shows, that the various patentees at various dates in the year 1870, conveyed the lands in question to David H. Moffat, Jr., as trustee

for the Denver Land Association. It also appears that David H. Moffat, Jr., trustee for the Denver Land Association, held this land until 1871, when he conveyed part of it to the St. Louis and Denver Mining Company; and that in 1872 he conveyed another part of it to the Colorado Coal Company; that the Colorado Coal Company held part of the land from 1872 to 1881, when it conveyed the same to Sidney Dillon, trustee; that in 1882 the St. Louis & Denver Mining Company conveyed its part of the land to Sidney Dillon, trustee; that Sidney Dillon, trustee, held the land until 1883, when he conveyed the same to the Union Coal Company. It also appears by the abstract of title (Record, pp. 138 to 144), and by the deposition of Sidney Dillon (Record p. 61), that he paid full value for the land, and further appears from the abstract of title that the other grantees, this defendant among others, paid large sums of money as consideration for the land. It appears also from the deposition of Sidney Dillon that he paid this money in good faith without notice of any fraud or irregularity of any kind; that he had first caused the title to be examined by reputable attorneys, and that after examining the title, including the patents and other conveyances which it is now sought to set aside, these attorneys reported the title good. It thus appears that large sums of money have been paid upon the faith of these very instruments of the United States which it now seeks at this late date to have this court of equity set aside and annul.

Again, many of the people who would have been likely to know if any fraud was committed are dead, or the facts have passed out of their memory. Henry Briggs testified (Record, pp. 76–77) in substance that all

the people whom he knew as concerned in the transaction were dead except one Wells; and, as above stated, the Government failed to call Wells or to offer any excuse for not calling him. Riggs states for example (Record, p. 78), that the Receivers or Registers of the Land Office in 1868, whom he apparently seeks to implicate as knowing more or less of what he called the fraudulent transactions, are both of them either dead or their whereabouts unknown. Briggs also himself testified (Record, p. 83) that his own health was broken down, and admitted that his memory may have been impaired.

None of the witnesses testified to any direct knowledge whatever with regard to the alleged fraud. Their testimony was hearsay. Yet the testimony, and the only testimony, on which the United States seeks to set aside and annul these patents and subsequent deeds, is the testimony of these seven witnesses, that they do not remember persons bearing the names contained in the list of the patentees which was shown to them. It is perfectly evident, upon even slight reflection, that this testimony can have little or no weight. Let us look at the circumstances. At the time their testimony was given seventeen years had elapsed since the applications, proofs, affidavits and certificates were made upon which the patents were issued (see dates, Record, pp. 1 *et seq.* and pp. 63–64). The country was then a new and growing country. Its population was rapidly changing; men came and went. In seventeen years it is very easy to forget the faces of men, and far more easy to forget names. Suppose, for example, there were to be presented to any member of this Court a list of names of

men living in his vicinity seventeen years ago, and the question was asked whether such one of you remembers whether persons bearing those names lived in your vicinity seventeen years ago, we venture to say that no one of you could say positively whether or not such person or persons bearing those names then lived in the vicinity. Yet it is from this kind of evidence alone that the United States seeks to annul and cancel its own solemn assurances of title.

We do not mean here to assert that the Statutes of Limitations or the doctrine of laches generally applies as against the United States; but what we do seek to maintain is, that when the United States comes into a court of equity and seeks to obtain the peculiar relief of a court of equity, it must present a case which, upon the just and equitable principles upon which that court acts, will entitle it to the relief sought; and if, by reason of the fact that many years have elapsed since the transactions occurred on which it seeks to base its relief, so that the witnesses are dead or inaccessable, and the facts cannot be ascertained by credible testimony, and meanwhile rights and equities have grown up and large sums of money have been paid on the faith of these instruments which it is sought to annul—then a court of equity must say to the United States, as it says to any other suitor, that the case is not one which, on the just and enlightened principles of equity, entitles the United States to equitable relief. These principles have already been declared in clear terms by the Courts.

In *United States vs. Flint*, 4 Sawyer, 42, Mr. Justice FIELD says (p. 58):

"The United States, by virtue of their sovereign character, may claim exemption from legal proceedings; but when they enter the courts of the country as a litigant, they waive this exemption, and stand on the same footing with private individuals. * * * And when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief. *Although, on the grounds of wise public policy, no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty, from this cause, of meeting objections which might, perhaps, at the time, have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the Court in determining whether it be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him.*"

Also in *United States vs. White*, 17 Fed. Rep., 561, SAWYER, J., says (p. 565):

"Again, the claim is stale. Although statutes of limitation do not run against the Government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States, as well as a natural person, is a complainant. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that Court (*U. S. vs. Tichenor*, 8 Sawyer, 156; *U. S. vs. Flint*, 4 Sawyer, 58–9; *Badger vs. Badger*, 2 Wall., 94; *Stearns vs. Page*, 8 How., 829). Under the State law this suit, if between private parties alone, would be barred within three years (*Manning vs. San Jacinto Tin Co.*, 7 Sawyer, 430). Six years elapsed between the issue of the patent and the filing of a bill, and no averment is made to show that the fraud was not dis-

covered, or by the exercise of ordinary diligence in the Land Office it might not have been discovered, immediately after its consummation."

So, also, in the present case there is no averment that the alleged fraud was not discovered, as an excuse for not beginning suit earlier.

See also

United States vs. Tichenor, 12 Fed. Rep., 415, 426.

United States vs. McGraw, 12 Fed. Rep., 449, 454.

In *United States vs. San Jacinto Pin Co.*, 23 Fed. Rep., 279, the Court says (p. 286):

"We might stop here, but there is another ground upon which the bill must be dismissed. To fully present this point will require a somewhat extended history of the proceedings in the case of this grant, and the presentation of the matter in a connected form will involve some repetition of matters already stated. *It would, in our judgment, be inequitable at this late day, considering all the circumstances of the case, to vacate the patent*, even if there had been some evidence of conspiracy and fraud on the part of the officers charged. 'When the United States enters a Court as a litigant it waives its exemption from legal proceedings and stands upon the same footing as private individuals, and therefore if, on a consideration of all the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity though the United States be the suitor' (*U. S. vs. Flint*, 4 Sawy., 43). Said Mr. Justice FIELD in the case cited: 'Although on grounds of wise public policy no statute of limitations runs against the United States, and no laches in bringing a suit can be imputed to them, yet the facility with which the truth could originally have been shown by them, if different from the finding made; the changed condition of the parties and of the property from lapse of time; the difficulty from this cause of meeting objections which might perhaps at the time have been readily explained,

and the acquisition of interests by third parties upon faith of the decree—are elements which will be considered by the Court in determining whether it will be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the Government be the suitor against him" (*Id.* 58). If it can be inequitable to grant relief to the United States in any case, in view of all the surrounding circumstances, coupled with a great lapse of time, then this case affords a striking instance of that kind. Several of the leading parties charged, including the Commissioner of the Land Office and Surveyor-General, are now dead, or, for other reasons equally potential, their testimony cannot be had."

Again, the bill does not allege any excuse for a failure to bring this suit at an earlier date, such as should always appear in a bill of this kind filed so long after the fraud is alleged to have occured. The rule on this point has been several times laid down in the decisions of this Court. For example, in *Badger vs. Badger*, 2 Wall., 87, 95:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill, otherwise the Chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer."

Again, no actual damage to the United States is shown in the present case. On this point, in *United*

States vs. White, supra, the learned Judge states what is equally true in the present case :

"It does not appear that the United States has been pecuniarly injured by the alleged fraud. No injury or damage is alleged, or in any way shown. The land was for sale to any duly authorized pre-emptioner at $1.25 per acre. Defendant paid the full amount of the purchase money, and it went into the United States Treasury. The Government got all that it would have obtained from any other party. It does not appear that anybody else had had any rights, or wanted to purchase, or that the United States was under any obligation to patent the land to any other person. There is no possible pecuniary injury to complainant. The most that can be said is that a principle of public policy was violated, and thereby a moral wrong resulted by reason of the legal disqualification, under the pre-emption act of defendant to purchase. But the wrong was only *malum prohibitum*, not *malum per se*. It is by no means clear that the demurrer ought not to be sustained on this ground, but it is unnecessary to so decide now, for, in my judgment, it is not a case to be taken out of the rule established in the cases cited of *Throckmorton and Vance*. In view of the notorious liberality in favor of purchasers, not to say looseness, with which the pre-emption laws have, ever since their adoption, been administered all over the Western states to relax the rules referred to in the authorities cited, especially where no actual pecuniary damage or injury has resulted either to the Government or private parties, and 'retry every case in which' the action of the Land Office, as well as 'judgments or decrees rendered on false testimony given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent,' would open a Pandora's box of evils 'far greater than any compensation arising from doing justice in individual cases.' It would open the door to any party stimulated by malice, or other unworthy motive, who could upon *ex parte* and false statements obtain the ear of the Attorney-General to promote suits in the name of the United States to the great vexation of honest, as well as dishonest, pre-

emptors, and to the great detriment of the public peace and prosperity."

The claim of the United States, therefore, should be rejected, because it is stale and inequitable.

V.

The complainant, therefore, wholly failed to make out any case against the defendant below, and the decision of the Circuit Court dismissing the bill of complaint was right, and should be affirmed by this Court.

JOHN F. DILLON,
HARRY HUBBARD,
For the Appellee.